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Editorial Opinion

By Jerome Sapiro, Jr.

— Needed: One Bug Zapper —

Giving a litigator a topic as broad as "bugs" presents an irresistible temptation. While acknowledging that every slight incurred in the litigation process could be the subject of article venting frustrations, I cannot resist the opportunity to highlight a few of my favorite peccadilloes.

I am offended by the way we elect judges. The cost of running for elected office has become an impossible burden for honest, competent candidates. More than two decades ago, a politician told me that he could successfully organize a gubernatorial campaign for $500,000. Now, it costs that much — five years' salary for a trial court judge — just to run in a local election for superior court. Who but the rich can afford to run in a contested election? As a result, judges and their opponents seek support from political parties and special interest groups. Ethically, judges and judicial candidates should not telegraph how they will decide particular cases. Potential sources of endorsements and funding, however, expect indications about how judges will rule in particular types of cases, regardless of the facts presented. The litmus test occurs during the campaign. Also, the candidates have to hire political consultants. If the consultants are not aggressive, their fees may be wasted. Attack advertising and thinly veiled promises to rule in a particular way polarize the judiciary and demean the judiciary in the minds of the public. The campaign trail jeopardizes the integrity of the bench.

I am also bugged by the way members of the executive and legislative branches of government attempt to control the outcomes of particular cases and types of cases. I am not referring just to special interest legislation. For example, the Governor and the Legislature appoint the majority of the members of the Commission on Judicial Performance. The Commission's staff encourages lawyers to be glorified court watchers, so a lawyer who loses a motion or trial can complain to them about the result. The judge who successfully defends an accusation that a decision was the result of bias is nevertheless permanently traumatized. This process is compounded by the way the Judicial Council and the Advisory Committee recommended adoption of the current Code of Judicial Ethics. In too many places, they merely changed hortatory language ("should") to mandatory language ("shall"). What had been ethical precepts became disciplinary rules. This made drafting the new rules easier, but it also increased the probability of disciplinary investigations arising from judicial decisions and not misconduct. This use of the disciplinary system to intimidate judges really bugs me.

Another bug is the judge who considers it a waste of his or her time to hear discovery motions. Discovery disputes are inevitable in many cases. The result of a discovery motion may be critical to the outcome of the case. Nevertheless, some judges consider discovery motions to be a waste of thier time. They give little

attention to the moving and opposing papers; they demean counsel who have the temerity to make or oppose discovery motions, or they sua sponte refer discovery motions to referees at the expense of the parties. Typically, these judges give both sides a hard time regardless of the merits.

Some judges with hostile attitudes toward discovery motions encourage certain lawyers not to conduct discovery. When discovery rules are violated, excessive discovery demands are made or legitimate discovery is obstructed, discovery motions are the only means of redress. But the vexatious party knows those motions cost a lot of time and money and knows that the victim of discovery abuse is as likely as the perpetrator to bear the brunt of the judge's wrath. Not only will the victim have to spend money to obtain relief, but the victim may also be victimized by a judge who resents discovery motions.

Moreover, many judges do not understand the discovery process. Some have never served or responded to an interrogatory or attended a deposition. They do not realize the purposes of or differences between types of discovery. Judges who do not understand the art of discovery think there should be arbitrary limits on the number of interrogatories, on the scope of document production, or on the length or number of depositions, regardless of the nature of the case. These judges defeat the purposes of discovery for the sake of simplicity and efficiency.

Conversely, another bug is the automatic imposition of sanctions in discovery motions. Bona fide disputes often arise in discovery proceedings. The mere fact that a motion to compel discovery is or is not granted should not automatically result in payment of sanctions. Yes, the parties and the court have spent time and money giving attention to the motion. But that should be an acceptable and expected part of the litigation process, unless abusive practices occurred.

If I were in charge, I'd get a bug zapper.

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The journal is sent free to members of the Litigation Section.

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